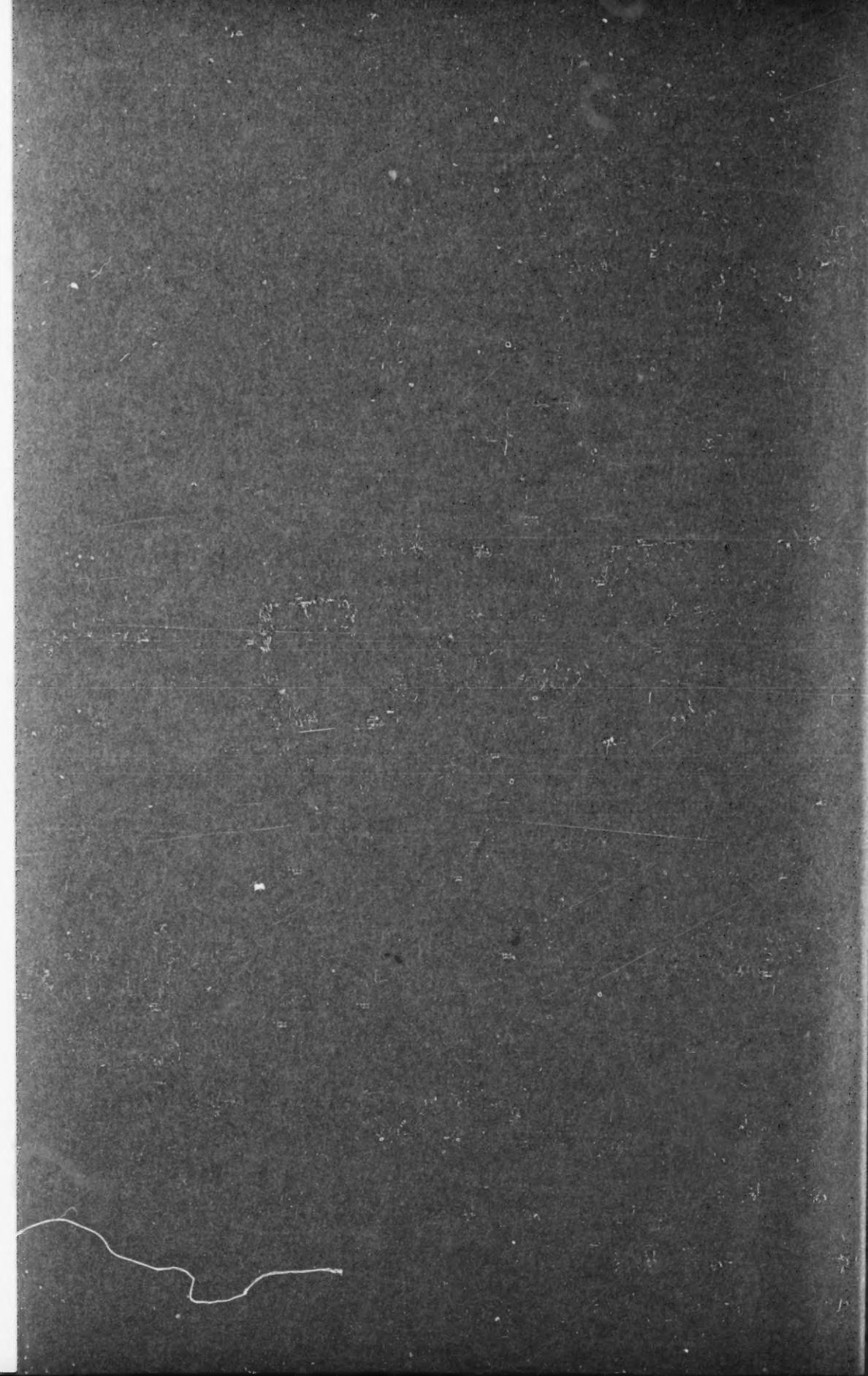

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6048
Non-Argument Calendar
D. C. Docket No. 92-PT-2082

MARYNELL SNEAD, GAIL MORRIS,
Plaintiffs-Appellants,

versus

GOODYEAR TIRE & RUBBER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(December 9, 1994)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This ERISA case presents two issues on appeal: (1) whether the district court correctly rejected the plaintiffs' contention that they should be authorized under ERISA to sue for compensatory damages for mental distress and for punitive damages, and (2) whether the district court abused its discretion in deducting from the plaintiffs' back pay award the amount the plaintiffs would have been paid if they had accepted the defendant's offer to continue working.

Because the plaintiffs' arguments for compensatory and punitive damages are at odds with both Supreme Court and circuit

precedent establishing that ERISA does not authorize such damages,[1] we affirm the district court's judgment on this issue.

The plaintiffs' second contention is that the district court should have awarded them more back pay than the amounts they received even though they turned down Goodyear's offer to continue working for Goodyear through the employment service. Concerning this issue, the district court held:

> Defendant offered to have the plaintiffs fill their positions through the contract provider, but both plaintiffs declined . . . The plaintiffs could have stayed employed under the new system, brought this action for relief, and suffered no significant harm. They elected another route. (R2-79-3, 9).

In sum, the district court held that the plaintiffs were to be made whole except to the extent of the amounts they would have been paid if they had not rejected the defendant's offer. Our review of the record persuades us that the plaintiffs' attack on this finding of the district court is baseless. It was well within the district court's discretion to exclude from the plaintiffs' back pay award the amount of money they would have been paid if they had accepted the offer to continue working. Accordingly, we affirm the judgment of the district court as it pertains to this issue.

AFFIRMED.

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[1] *See Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991); *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988) *cert. denied*, 488 U.S. 832, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION
92-PT-2082-M

MARYNELL SNEAD and GAIL MORRIS,
Plaintiffs,

v.

GOODYEAR TIRE & RUBBER COMPANY,
Defendant.

FINAL JUDGMENT

[Entered: Dec. 17, 1993]

In conformity with the Findings of Fact and Conclusions of Law entered in this case on October 21, 1993 and at the hearing on November 22, 1993, it is hereby ORDERED, ADJUDGED, and DECREED that:

A. REINSTATEMENT

1. Within fifteen (15) calendar days following the entry of this Judgment, each of the plaintiffs shall be reinstated to employment with the defendant in the position of Plant Nurse with credited service for the period since their termination on October 16, 1991 and with full service rights as though they had not been laid off or terminated on October 16, 1991.

2. In the event either or both of the plaintiffs does/do not desire reinstatement, the plaintiffs' attorney shall so notify the defendant's attorney on or before December 20, 1993.

B. BENEFITS

Within thirty (30) calendar days following the entry of this Judgment, the defendant shall take the following steps for the restoration of benefits:

3. *Pension Plan:* The defendant shall fund the Salaried Employees Pension Plan with the following amounts which would have been contributed by the defendant to such pension plan if the plaintiffs had been working since October 16, 1991:

Marynell Snead	$2,288
Gail Morris:	$1,300

4. *Vacation Pay:* The defendant shall pay to the plaintiffs the amounts which they would have been paid during their vacations since October 16, 1991. The plaintiffs have been paid vacation pay in 1991. The amounts of the vacation pay the plaintiffs would have received in 1992 and 1993 are as follows:

Marynell Snead:	$4,864.60
Gail Morris:	$2,813.52

5. *Savings Plan:* The defendant shall fund the Savings Plan with the following amounts which would have been contributed by the defendant with respect to the plaintiffs had they been working since October 16, 1991:

Marynell Snead:	$1,130.55
Gail Morris:	$ 819.06

6. *Health Care Coverage:* The plaintiffs continued to be covered by the Flex-Choice Health Care Plan for one year to October 16, 1992. Neither has incurred any expense for COBRA continuation or replacement insurance since October 16, 1992. During the period since October 16, 1992, they incurred the following health care expenses:

Marynell Snead: $ 112

Gail Morris: $1,016.50

The defendant shall pay such amounts to the plaintiffs.

C. BACK PAY

7. If plaintiff Marynell Snead had accepted to offer to continue to work as a contract nurse, she would have had her pay 100% supplemented up to her base pay through the SUB Plan for a period of 171.3 weeks, or 3 years and 3 months to January 16, 1995. (Plaintiff's Exhibit No. 13). In accordance with the Court's finding on the failure to mitigate issue, such plaintiff is not due any back pay except that for the period from October 16, 1991 to March 1, 1993 (when she obtained a higher paying job at Baptist Medical Hospital in Gadsden, Alabama), she is due back pay representing the amount she would have received in overtime pay computed on her base rate. Based on the stipulation of the parties, such amount is found to be $2,860.12.

8. If plaintiff Gail Morris had accepted the offer to remain as a contract nurse, she would have had her pay 100% supplemented up to her base pay for a period of 97.9 weeks, or 1 year and 10-1/2 months to August 31, 1993. (Plaintiff's Exhibit No. 18). In accordance with the Court's finding on the failure to mitigate issue, such plaintiff is not due back pay except that (a) for the period from September 1, 1993 (when the SUB supplementation would have expired) to December 31, 1993, she is due back pay representing the difference between the amount she would have earned as a contract nurse without the SUB supplementation and the amount she would have earned in base pay during such period; and (b) for the period from October 16, 1991 to December 31, 1993, she is due back pay representing the amount she would have received in overtime pay computed on her base rate. Based on the stipulation of the parties, the total of such amounts is found to be $6,263.66.

D. AMOUNTS TO BE PAID TO THE PLAINTIFFS:

9. The amounts to be paid to the plaintiffs in accordance with this Judgment are as follows:

	Marynell Snead	Gail Morris
Back pay	$2,860.12	$ 6.263.26
Vacation pay	4,864.60	2,813.52
Medical Expenses	112.00	1,016.50
Total	$7,836.72	$10,093.28

10. Such amounts shall be paid within thirty (30) days following the entry of this Judgment.

11. The parties have stipulated to the above figures and plaintiffs have waived prejudgment interest on these sums.

E. COSTS

12. Costs authorized by 28 U.S.C. § 1920 are taxed against the defendant.

DONE and ORDERED this 17th day of December, 1993.

/s/ Robert B Propst
ROBERT B. PROPST
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CV92-PT-2082-M

MARYNELL SNEAD and GAIL MORRIS,
PLAINTIFFS,

v.

GOODYEAR TIRE & RUBBER CO.,
DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Oct. 21, 1993]

This cause came on to be heard at a bench trial. The sole issues are (1) whether defendant violated 29 U.S.C. § 1140 in terminating the plaintiffs; and (2) the nature and extent of the relief to which plaintiffs are entitled, if there has been such a violation. The defendant has acknowledged, on the record, that if its agent terminated the plaintiffs with a specific intent to save the cost of funding ERISA benefits, defendant would have violated § 1140. Because of this acknowledgment, the court has not otherwise considered whether to law so provides. The court will thus first address whether plaintiffs have proved such intent.

Claimed Violation

It is undisputed that the decision to terminate the plaintiffs was made solely by the head of defendant's Gadsden Plant's Division of Industrial Relations, James Allen.[1] Allen was first

[1] The court may confuse whether divisions or departments are at the higher level. The court understands that the higher level "divisions" at the Gadsden plant are: (1) Industrial Relations (2) Development (3) Quality Assurance (4) Production (5) Finance (6) Engineering (7) Others?

(Footnote 1 continued on next page)

employed by defendant in 1977. He came to the Gadsden plant in March 1989. There had been general discussions that the Gadsden plant was not cost competitive. The Plant Manager had stated that the division heads needed to be cost conscious and reduce costs.

During the summer of 1991, Allen, as the sole decision maker (except for the general "cost conscious" instruction), decided to terminate or lay off the plaintiffs, who were permanently employed registered nurses, and to replace them, in the same jobs, with nurses supplied by a temporary employee provider who would employ the nurses and contract with defendant to fill the jobs with the provider's employees.

There was never any question about plaintiffs' performance as nurses. The court finds that they were good nurses and were not terminated for any reason related to work performance. Plaintiffs were replaced, through temporary service providers, by temporary LPN's at substantially the same cost as plaintiffs' base pay. The plaintiffs were notified of their termination on September 6, 1991.[2] The terminations were effective October

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(Footnote 1 continued)

The "departments" within Allen's division were (1) Labor (2) Hospital (3) Training (4) Janitorial (5) Industrial Relations (6) Safety (7) Security (8) Insurance (9) Others? If the court has divisions and departments reversed, it is of no consequence. "Hospital" was under Allen. The plaintiffs were in "Hospital."

[2] Sheila Dean, the head nurse, did not recommend the terminations and did not know of them until the day before the announcement of the terminations. No supervisor below Allen recommended the terminations. No supervisor above him specifically recommended them. He may have felt some general pressure from above to cut costs. His decision to terminate the plaintiffs was based solely on his desire to reduce costs. According to Allen, he had no real insight to how this cost reduction would result except as to a reduction in payroll taxes and vacation time. (There could have been some possible savings in administrative costs and in future cross the board raises.) There was no actual analysis.

16, 1991. The defendant did not offer the plaintiffs an opportunity to remain as salaried employees at reduced pay, but with continued benefits. The defendant reserved the right to influence the decision as to whom the temporary agencies would provide as replacements. It could have insisted on the plaintiffs being given the jobs and apparently wished to retain them. Defendant offered to have the plaintiffs fill their positions through the contract provider, but both plaintiffs declined. The contract provider filled plaintiffs' old jobs with "temporary" nurses. Defendant paid the provider substantially the same base pay per employee as it had been paying the plaintiffs. If the plaintiffs had accepted the defendant's offer to remain employed under the new arrangement, they would have received a significant base pay. Defendant would not have paid the employer's share of payroll taxes and would not have contributed, as it did before, to fund certain ERISA benefits for plaintiffs.

There is at least one type of financial report to which Allen had access prior to his making the termination decisions. It was a report which compared budgeted costs to actual costs.[3] The BVA's were prepared by the defendant's Gadsden plant Finance Office on a monthly basis. These reports were started in 1989, about the time Allen arrived in Gadsden. The parties acknowledge that the BVA's contained at least eight line items of ERISA type benefits. The undisputed evidence is that the cost of all these benefits were allocated to divisions, not on an actual cost basis but under a system whereby total costs were distributed based on such factors as numbers of employees, square footage, etc. The item for vacation costs includes accrued, but not taken, vacation. It does not include costs of replacements for employees on vacation. Although many of the costs stated on the BVA reports were distributed costs, Allen, at the time of his decision, thought they were actual costs charged to his division.

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[3] Referred to in the testimony as BVA's.

Defendant provided, in response to plaintiffs' interrogatories, Px. 86. These combined exhibits (entitled Cost Of Fringe Benefits Per Hour, The Goodyear Tire and Rubber Company Gadsden Plant) reflect allocated costs attendant to employees at the plant. These documents were not available, as such, to Allen at the time he made his decision. They were prepared for this litigation. The exhibit reflects the following per hour totals with regard to ERISA and non-ERISA fringe benefits.

	ERISA	**Non-ERISA**
1988	$4.18	$ .14 1/2
1989	$4.42	$ .29
1990	$4.81	$ .32
1991	$5.40	$ .38

This data reflects, of course, that ERISA benefits attendant to the cost of permanent employees far exceeded non-ERISA benefit costs. The defendant is self-insured as to medical benefits. There is no funding until medical costs are incurred.

Although Allen acknowledges that the sole purpose of the layoffs was to save cost attendant to plaintiffs' employment, he denies that cost savings related to ERISA benefits was a factor in his decision. He acknowledges that he made no specific cost analysis, but just assumed that there would be a savings in payroll taxes and that the savings in payroll taxes justified the decision. According to him, he gave no consideration to ERISA benefits. While this court does not enjoy making what could be perceived as credibility choices, it goes with the territory. While Allen says that he gave no specific consideration to ERISA benefits, there are several factors which would suggest that he did, albeit not by specific analysis. Although the court does not find that Allen deliberately testified falsely, the court does conclude that because ERISA benefits were not specifically

analyzed, Allen may *now* be led to think that he gave them *no* consideration.

The factors which suggest that, more likely so than not so, Allen specifically considered the ERISA benefits include:

(1) The wide disparity between the dollar amounts attributable to ERISA benefits and those lower amounts which Allen says that he did consider.

(2) The fact that Allen saw BVA reports and thought, at the time of his decision, that the charges were actual, not distributed.

(3) The fact that the amount in hourly payments to the provider(s) for LPNs, except for benefits, was approximately the same as plaintiffs were being paid.

(4) Allen had a long time career in an area involving personnel management and likely had an awareness of the significance of benefits.

(5) The common knowledge that benefits are a significant part of an employment package.

(6) The fact that there was some pressure from above to reduce costs. Within a short time after the decisions, the company began making written benefits comparisons.

(7) There was no question about plaintiffs' work performance.

(8) The fact plaintiffs could have continued to work under the new system. Defendant retained the right to influence such decisions. There were no written contracts with the providers.

(9) Plaintiffs were not offered the opportunity to stay at reduced salary with benefits.

Relief

Plaintiffs seek enforcement pursuant to 29 U.S.C. § 1132(a)(3). 29 U.S.C. § 1140 provides that "section 1132 of this title shall be applicable in the enforcement of this section." The only portion of § 1132 which this court can conclude has application to relief or remedy is § 1132(a)(3) (§ 502(a)(3)).[4] In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 150 (1985), Justice Brennan, in a concurring opinion, stated that the Court was saving for another day "the nature and extent of the 'appropriate equitable relief . . . to redress' such violations under § 502(a)(3)."[5] The court has now answered that saved question.

In *Mertens v. Hewitt Associates*, ___ U.S. ___ (1993), the Court held that 29 U.S.C. 1132(a)(3) does not provide for the recovery of compensatory or punitive damages. While there may be Circuit court cases prior to *Mertens* which suggest to the contrary, it is not necessary for this court, in view of *Mertens*, to determine if the facts in those cases are distinguishable from those here. Note 7 in the amended decision of *McRae v. Seafarers*, 920 F.2d 819 (11th Cir. 1991), seems to have been a precursor of *Mertens*. The Eleventh Circuit rejected the argument that *Ingersol-Rand* [sic] *v. McClendon*, 111 S.Ct. 478 (1990) provided to the contrary of the ultimate holding in *Mertens*. Plaintiffs' suggestion that the majority in *Mertens* did not address the damages issue is not well taken. Even the dissenters in *Mertens* seem to suggest that punitive damages are not available under § 1132(a)(3). See dissenters' note 6 and cases cited therein. See also majority opinion, note 7.

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[4] Except, of course, for the attorney fees provisions.

[5] Justice Brennan also stated that 29 U.S.C. § 1109 protects the plan, not individuals. *Id.* Thus, the possibility that § 1109 and § 1132(a)(2) may allow for, in addition to "equitable" relief, "remedial" relied, provides no answer here. The fact that 502(a)(3) makes no reference to "remedial" relief suggests a restriction to "equitable" relief. See note 8 of the majority opinion in *Mertens, infra.*

Ultimate Findings And Conclusions

This court finds and concludes that defendant violated 29 U.S.C. § 1140 when it terminated (laid off) the plaintiffs. This conclusion is based on the court's finding that the ERISA benefits were specifically considered when the decision was made and defendant's acknowledgment that such consideration constitutes a violation. The court does not conclude that the terminations resulted solely from a consideration of ERISA, but does find that defendant specifically intended to reduce the costs of ERISA benefits. *See Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993). This case is comparable to *Seaman* in that the employees were offered an opportunity for continued association on a non-employee basis. The only basis for providing relief is 29 U.S.C. § 1132(a)(3) (except for, possibly, attorney fees).[6] *Mertens* forecloses the recovery of punitive and/or com-

[6]Plaintiffs have acknowledged that "*In Ingersol-Rand* [sic], *supra* the U.S. Supreme Court stated that 29 U.S.C. § 1132(a) is the exclusive remedy for violations of 29 U.S.C. 1140:

> In *Pilot Life* we examined this section at some length and explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510,

Id. at 485.

* * *

> Of particular relevance in this inquiry is § 502(a) — ERISA's civil enforcement mechanism. That section as set forth in 29 U.S.C. §§ 1132(a)(3), provides in pertinent part:
>
> > A civil action may be brought . . . (3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.
> >
> > . . .

Id. at 485.

From the above language, the Supreme Court seems to imply that 29 U.S.C. 1132(a)(3) is the basis for relief for violation of 29 U.S.C. 1140." (Quoted from plaintiffs' brief).

pensatory damages under this section.[7] This court does not reach the issue of whether mental anguish or punitive damages would be appropriate, in any event, under these facts. The plaintiffs could have stayed employed under the new system, brought this action for relief and suffered no significant harm. They elected another route.

The court concludes that the plaintiffs should be reinstated with no loss of benefits or back pay. Since they did not mitigate their damages by remaining employed, they are not entitled to any back pay except to the extent of the difference, if any, between the amount they were earning plus any cost of living raises, etc., less what they could have eared during this period as temporary employees and what they have earned in other jobs for periods in which the amounts would have exceeded the temporary job pay to the extent of any such excess.

Within ten days, the defendant will, consistent with this opinion, file and serve a proposed judgment which includes such amounts as are contemplated by these findings and conclusions[8] and a provision for reinstatements, with benefits accrued retroactive to date of termination. In general, plaintiffs are to be made whole except to the extent, as indicated, they did not mitigate their damages. Plaintiffs will have ten days to object to the proposed judgment. There is no need for plaintiffs to object to anything which is consistent with these findings and conclu-

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[7] Cases which predate and are inconsistent with *Mertens* are neither controlling nor persuasive. The Supreme Court clearly addresses the language of § 1132(a)(3). Plaintiffs' attorney is persistent. He represented the plaintiff in *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988). The trial court found a violation of 29 U.S.C. § 1140, but held that *no* provision of § 1132 provides for the recovery of extra-contractual damages. *Mertens* simply puts the icing on the *Bishop cake*. Plaintiffs have inextricably argued that Bishop "has no meaning" to a § 1140 claim.

[8] The court places this burden on defendant because, initially, it may be in a better position to calculate the amounts.

sions, only as to amounts, etc. which are arguably inconsistent herewith.

This 21st day of October, 1993.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES
DISTRICT JUDGE